

CRAIG M. NICHOLAS (Bar No. 178444)
cnicholas@nicholaslaw.org

SHAUN MARKLEY (Bar No. 291785)
smarkley@nicholaslaw.org

JAKE W. SCHULTE (Bar. No. 293777)
jschulte@nicholaslaw.org

NICHOLAS & TOMASEVIC, LLP

225 Broadway, 19th Floor
San Diego, California 92101
Tel: (619) 325-0492
Fax: (619) 325-0496

NOAM GLICK (Bar No. 251582)

noam@glicklawgroup.com

GLICK LAW GROUP, P.C.

225 Broadway, Suite 2100
San Diego, CA 92101
Tel: (619) 382-3400
Fax: (619) 615-2193

Attorneys for Defendants
KIM EMBRY and
ENVIRONMENTAL HEALTH ADVOCATES, INC.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

B&G FOODS NORTH AMERICA, INC.,

Plaintiff,

v.

KIM EMBRY and ENVIRONMENTAL
HEALTH ADVOCATES, INC., acting as
enforcement representatives under California
Proposition 65 on behalf of the State of
California,

Defendants.

CASE NO. 2:20-CV-00526-KJM-DB

**REPLY TO STATEMENT REGARDING
ORAL ARGUMENT ON MOTION TO
DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT**

Hearing Date: March 10, 2023

Hearing Time: 10:00 a.m.

Courtroom: 3 (15th Floor)

District Judge: Hon. Kimberly J. Mueller

Magistrate Judge: Hon. Deborah Barnes

Complaint Filed: March 6, 2020

FAC Filed: July 7, 2022

SAC Filed: November 23, 2022

Trial Date: None Set

1 After the Motion to Dismiss was submitted, B&G improperly filed a “Statement Regarding
2 Oral Argument” with four exhibits. The Court should strike the pleading, as it was submitted without
3 leave. However, to the extent the Court considers this belated filing, it does not show that Defendants
4 are state actors – if anything, it shows the opposite. Defendants respectfully request that if the Court
5 takes B&G’s filing into account, the Court also consider this brief response.

6 B&G’s exhibits do not add anything. Most of them (Exhibits 1-3) show the rare occasion in
7 which a Proposition 65 private enforcer and the Attorney General both maintain lawsuits with respect
8 to the same chemical in the same or similar products against the same or similar defendants. Then,
9 like any other civil matter where cases address the same subject, courts will relate or consolidate the
10 actions. But both the private enforcers and the Attorney General are still taking independent actions
11 and making independent litigation decisions.

12 The final exhibit (Exhibit 4) shows another rare occasion in which a private enforcer’s
13 investigation efforts that lead to the Attorney General bringing a case will result in the private enforcer
14 being compensated. Again, this is a result of independent actions and decisions.

15 Even if the Court found that prosecution of separate, parallel cases or compensation to a
16 private enforcer in a case brought by the Attorney General made the private enforcers in those cases
17 state actors, that would only highlight that Defendants here are not state actors. B&G has not pled –
18 and cannot plead consistent with Rule 11 – that the Proposition 65 cases at issue fall into those
19 categories. If anything, therefore, B&G’s belated filing shows that Defendants are not state actors.

20 *[See signature on following page.]*
21
22
23
24
25
26
27
28

1 Respectfully submitted,

2 Dated: March 13, 2023

NICHOLAS & TOMASEVIC, LLP

3 By: /s/ Jake W. Schulte
4 CRAIG M. NICHOLAS (Bar No. 178444)
5 cnicholas@nicholaslaw.org
6 SHAUN MARKLEY (Bar No. 291785)
7 smarkley@nicholaslaw.org
8 JAKE W. SCHULTE (Bar. No. 293777)
9 jschulte@nicholaslaw.org
10 **NICHOLAS & TOMASEVIC, LLP**
11 225 Broadway, 19th Floor
12 San Diego, California 92101
13 Tel: (619) 325-0492 | Fax: (619) 325-0496

14 NOAM GLICK (Bar No. 251582)
15 noam@glicklawgroup.com
16 **GLICK LAW GROUP, P.C.**
17 225 Broadway, Suite 2100
18 San Diego, CA 92101
19 Tel: (619) 382-3400 | Fax: (619) 615-2193

20 Attorneys for Defendants
21 KIM EMBRY and ENVIRONMENTAL HEALTH
22 ADVOCATES, INC.
23
24
25
26
27
28